FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petitioner's Reply Brief

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

INDEX

Page

ARGUMENT

1. Special and Important Reason to Review the Opinion Below 2

The Fifth Circuit Failed to Note a Simple Distinction in the Texas Cases 5

2. Connecticut General's "Facts" 5

Facts Establishing Connecticut General's Attempted Fraud 6

3. Connecticut General Recognizes the Rule on Waiver by Election of Defenses 8

Connecticut General Waived the Defense Based on the Policy Provision by Electing to Defend on Fraud 9

CONCLUSION 10

CERTIFICATE OF MAILING 10

LIST OF AUTHORITIES

Page

Lee v. Mutual Protective Ass'n. of Texas,
47 S.W. 2d 402, 404 (Tex. Civ. App. 1932, writ dism'd.) 8

Liverpool & London & Glove Insurance Co. v. Ende
65 Tex. 118, 123 (Tex. 1885) 8

Minnesota Mutual Life Insurance Co. v. Morse
476 S.W. 2d 753 1

National Aid Life Ass'n. v. Murphy
78 S.W. 2d 223 ..... 4, 8

Republic Insurance Co. v. Silverton Elevators, Inc.
477 S.W. 2d 336 1-2

Scott v. Industrial Life Insurance Co.
411 S.W. 2d 769 ..... 4, 9

43 Am. Jur. 2d 1038, Ins. §1117 3

45 C.J.S. 648, Ins. §692 7

45 C.J.S. 656-57, Ins. §696 7

45 C.J.S. 671, Ins. §704 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petitioner's Reply Brief

Petitioner Loretta Fay Beck replies to the argument of Connecticut General against a review of the opinion of the Fifth Circuit and says:

1. There are special and important reasons why this Court should review the opinion of the Fifth Circuit.

2. The "Facts" argued by Connecticut General are not true and are designed to hide the Fifth Circuit's misstatement of the Texas law.

3. Connecticut General's argument against "Waiver by election of defenses" (pages 14 and 15) is based on its version of the facts — not on the correctness of the Fifth Circuit's opinion concerning Texas law.

4. The Texas Supreme Court has recently granted applications for writ of error in *Minnesota Mutual Life Insurance Co. v. Morse*, 476 S.W. 2d 753 and *Re-*

public Insurance Co. v. Silverton Elevators, Inc., 477 S.W. 2d 336, (cited in the Petition for Writ of Certiorari). Arguments were heard in these cases on July 19, 1972. It is likely that the Texas Supreme Court will explain further those instances where the doctrines of waiver and estoppel have application when its term begins in October, 1972.

ARGUMENT

1. Special and Important Reason to Review the Opinion Below.

The opinion of the Court of Appeals for the Fifth Circuit has been reported at 456 F. 2d 1040. The importance of the Fifth Circuit's misstatement of Texas law is brought into focus by the first headnote. It is keyed to *West's Texas Digest Insurance 372(3)* and, in substance, states that, under Texas law, a good health clause "*could not be waived and the insurer could not be estopped*" from asserting it regardless of the facts.

Connecticut General makes the same argument on page 6 of its brief:

> "The Fifth Circuit did not in its opinion find it necessary to discuss the facts of the case, holding that as a matter of law petitioner was not entitled to recover even under the assumptions indulged by Petitioner ***
>
> " *** there is no *legal* basis for waiver regardless of *factual* considerations."

The Fifth Circuit has abandoned the historic and

universal doctrines of waiver and estoppel — the opinion represents a radical departure from the established law of Texas.[1] Without the slightest doubt or hesitation, the Fifth Circuit stated that the doctrines

---

[1]The two rules rejected by the Fifth Circuit and relied upon by Petitioner are stated as follows:

Rule One:

"***Where a policy is issued with knowledge by the insurer, actual or presumed, of facts which would otherwise vitiate the policy under a provision embodied therein, or of the falsity of a material representation contained in the application, the provision or misrepresentation is deemed waived by the insurer by the unconditional issuance or delivery of the policy. That is to say, where the insurer, at the time of the issuance of a policy of insurance, has knowledge of existing facts which, if insisted on, would invalidate the contract from its very inception, such knowledge constitutes a waiver of conditions in the contract inconsistent with the known facts, and the insurer is estopped thereafter from asserting the breach of such conditions. The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premium received; and when the policy contains a condition which renders it voidable at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition and to execute a binding contract, rather than to have deceived the insured into thinking he was insured when in fact he was not, and to have taken his money without consideration.

"An insurer is also precluded from relying on a breach of policy clause when at the time of the issuance of the policy both the insurer and the insured are aware of an uncertainty as to insured's compliance with the clause." 43 Am. Jr. 2d 1038, Ins. §1117, and Texas authorities cited therein. Also see 45 C.J.S. 671, Ins. §704 and Texas authorities cited therein.

Rule Two:

"Where the company denies liability or refuses to pay a loss on a specified ground, it is estopped to assert other grounds relieving it from liability of which it had full knowledge where insured has acted on its position as announced and suffered resultant detriment, or as the rule is sometimes more broadly stated, when one specific ground of forfeiture is urged against a policy of insurance and the validity thereof denied on that ground alone, all other grounds are waived."

of waiver and estoppel have no application in Texas:

> "This is not the law in Texas as the following cases make clear. (Citing three cases.) To the extent that the cases cited in the margin would support Appellee's position, they have been overruled."[2]

On rehearing the Fifth Circuit was not as sure of the Texas law. It noted later opinions of the Texas Supreme Court and Texas Courts of Civil Appeal " *** *which held that waiver and estoppel could be applied against an insurance company that delivered a policy to an insured with knowledge that he was in bad health.*"

The Fifth Circuit resolved its confusion — not by analyzing the cases — but by a mere "guess" or "prediction" of what the Texas Supreme Court would hold today:

> " *** we continue to believe our initial *Erie* guess to be the correct prediction *** "

A principle so vital to Petitioner and the millions of Texas residents whose security depends upon the proceeds of life insurance deserves something better than a mere "*guess*" or an unfounded "*prediction*". Had the Fifth Circuit made a careful analysis of the Texas cases it cites, it would have found the law well

---

[2]The three cases cited in the margin as being overruled have never been questioned by the Texas Courts and are still cited as controlling. The absurdity of the Fifth Circuit's opinion becomes obvious when it cites *Scott v. Industrial Life Ins. Co.*, 411 S.W. 2d 769 as an authority overruling *National Aid Life Ass'n. v. Murphy*, 78 S.W. 2d 223. By no stretch of the imagination are these cases in conflict. The language showing there is no conflict is quoted on page 15 of Connecticut General's Brief.

established, that there is no conflict between the decisions and no basis for its "*Erie guess*" or "*prediction*".

The Fifth Circuit Failed to Note a Simple Distinction in the Texas Cases.

All Texas cases cited can be easily distinguished on the basis of whether or not the insurer was charged with *knowledge* of the breach of the policy provision at the time the policy was delivered. If the insurer did not have knowledge of the applicant's illness, the good health provision will be given effect. If the insurer, *with knowledge* of the applicant's illness, chooses to deliver the policy and collect the premium, it then waives the good health provision. The Fifth Circuit failed to note this simple distinction and has vitiated the doctrines of waiver and estoppel. There is an immense difference between saying "the rules do not exist" versus "the rules have no application to these facts".

2. Connecticut General's "Facts"

A large portion of Connecticut General's Reply Brief is devoted to "The Facts". In general, it charges that Beck was guilty of fraud. The misstatements of fact are so gross as to hide the Fifth Circuit's misstatement of the law.

"The Facts" as outlined on pages 2 to 7 of Connecticut General's Brief, bear little resemblance to the truth. If Connecticut General's "Facts" were true and it did not have knowledge of Beck's illness, the rules on waiver and estoppel would have no application. The

Fifth Circuit could have so stated without doing violence to the principle of law. In truth, it is Connecticut General, not Beck, who is attempting a fraud. The jury found that Beck was not guilty of fraud. (R. 522, Questions 2-5) The Trial Court, by applying Texas law, determined that Connecticut General was attempting a fraud.

Facts Establishing Connecticut General's Attempted Fraud

While Connecticut General denies knowledge of Beck's illness, the undisputed evidence shows otherwise:

1. Around September 25, 1968 — about a week before the policies were delivered — Beck telephoned Connecticut General's agent and told him that he (Beck) was in or had just gotten out of the hospital, that he was having a problem with poor circulation; that he was taking drugs to dilate his blood vessels and improve circulation. (R. 432-433, 456) Connecticut General was also informed that Beck was scheduled to go to Baylor University Medical Center in Dallas later in October for additional studies and tests to determine the cause of his illness. (R. 435)

2. With this knowledge, Connecticut General delivered the policies to Beck some time in October, 1968. (R. 434) It collected $718.25 in premiums on October 7, 1968. (Plaintiff's Exhibits 3, 4 and 5, Tr. 14-16)

3. The jury found that, at the time the policies were delivered, Connecticut General's agent *had knowledge of facts reasonably sufficent to put him on notice that*

Jerry D. Beck was not in good health". (R. 529, Question 12)

Connecticut General is charged with the knowledge of its agent. 45 C.J.S. 648, Insurance §692, in part reads:

> "*Stipulations in policy.* Notice to an agent of a ground for forfeiture may be notice to the company, although the agent is without authority to waive the forfeiture, or although the policy provides that the agent has no authority to waive its conditions *** "

Also see 45 C.J.S. 656-657, Insurance §696 and authorities cited in footnote 5, page 10, Petition for Certiorari.

4. Before Beck's death, Connecticut General refused to rescind the policies and refund the premiums when its Fort Worth Manager asked the home office about the possibility of a claim being made. Connecticut General confirmed its notice of Beck's illness in a letter written by a Vice President in the home office (Tr. 349, Plaintiff's Exhibit No. 16)

> " *** You indicated to me that Mr. Beck had become ill around September 20 and although he had not worked since that date *** . The point of your call was that Beck was gong back to the hospital and there, obviously, would be a question regarding any potential claim during the period of time immediately subsequent to issue."

How can Connecticut General avoid being charged with knowledge of facts reasonably sufficient to put it on notice that Beck was not in good health? The jury

found that Connecticut General had knowledge of Beck's bad health in time for the company to have requested the return of the policies prior to Beck's death. (R. 527, Question 8)

Restating the Texas rule:

> "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as grounds of avoidance, is to *attempt a fraud*".

See, *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118, 123 (Tex. 1885), *Lee v. Mutual Protective Ass'n of Tex.*, 47 S.W. 2d 402, 404 (Tex. Civ. App. 1932, writ dism'd), *Superior Ins. Co. v. Kling*, 321 S.W. 2d 151, 155-156 (Tex. Civ. App. 1959, Aff'd, 327 S.W. 2d 422).

Connecticut General's attempted fraud has been completed by the Fifth Circuit — under its judgment, Connecticut General is entitled to keep Beck's premiums without liability. The opinion of the Fifth Circuit is an invitation for a fraudulent insurer to use the federal courts to hide its fraud.

3. Connecticut General Recognizes the Rule on Waiver by Election of Defenses.

In spite of the Fifth Circuit's opinion, Connecticut General recognizes that Texas Courts have uniformly applied the rule on waiver as stated in *National Aid Life Ass'n v. Murphy*, 78 S.W. 2d 223, 237 (Tex. Civ. App. 1934 — writ dism'd.). The argument of Connecticut General on pages 14 and 15 of its Brief is not against the rule, but against the application of the

rule. It argues that its version of "the facts" do not invoke the rule.

Connecticut General quotes from *Scott v. Industrial Life Ins. Co.*, 411 S.W. 2d 769, 772, on page 15 of its brief — this is the case the Fifth Circuit cited as an authority overruling the *Murphy* case. The language quoted by Connecticut General from the *Scott* case shows clearly that there is no conflict between the *Scott* and *Murphy* opinions. In fact, the *Murphy* case is cited in the *Scott* opinion with approval. It is a mystery as to why the Fifth Circuit held the *Scott* case to be an authority overruling the *Murphy* case.

Connecticut General Waived the Defense Based on the Policy Provision by Electing to Defend on Fraud

The pleadings and pre-trial order established the theory of Connecticut General's defense. All medical testimony was developed on the theory that Petitioner would be defending against the charge that Beck had fraudulently represented himself to be in good health. The mere pleading of fraud based upon representations of good health will not raise a different defense based on a policy provision — a condition precedent requiring good health. The submission of a question on good health to the jury in connection with the fraud defense should not amount to a waiver by Petitioner of an unplead defense based on a policy provision not brought to the attention of the trial court or the opposing party.

CONCLUSION

The Fifth Circuit has permitted Connecticut General to argue successfully that it *knowingly* sold $718.25 of worthless policies. Connecticut General may now retain the premiums without liability. There is no authority in Texas law which can lend support to the absurd results reached by the Fifth Circuit. A Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF MAILING

I, Bill Atkins, attorney of record for Petitioner, do hereby certify that the foregoing Reply Brief of Petitioner has been served upon Respondent, Connecticut General Life Insurance Company, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to its attorney of record, Thos. H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102.

Bill Atkins